In the Supreme Court of the United States.

OCTOBER TERM, 1923.

ORIGINAL.

IN THE MATTER OF SKINNER & EDDY CORPORATION, PETITIONER.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, ETC.

At this stage of the proceedings it is not in order to raise any issue with respect to the facts alleged in the petition. These facts are not admitted and if the writ should be granted they will be controverted in so far as erroneously or incompletely alleged.

It is, however, desired in order to avoid wasting the time of the court to point out sufficient reasons why the motion for leave to file the petition for a writ should be denied upon the facts as alleged and under well-settled rules of law. The opinion of the Court of Claims, under which the motion of the petitioner to dismiss the case in the Court of Claims was denied and the counterclaim of the United States filed, is hereto annexed and marked "Exhibit A."

Attention is called to the following facts which appear upon the face of the petition. The petition was filed in the Court of Claims on June 15, 1921—a copy of the petition was filed by the petitioner in this court on this application. As was expressly held by the Court of Claims in its opinion the petition included causes of action against the United States based on alleged breaches of contract specifically alleged to have been made by the United States through its agent the Fleet Corporation. Without discussing the point as to whether the Court of Claims had jurisdiction to entertain so much of the petition as related to other causes of action to recover just compensation for cancellation of contracts made in behalf of the United States by the Fleet Corporation as an agency selected by the President under the Emergency Shipping Fund Provisions of the Act of June 15, 1917, in the absence of allegations showing that prior to the filing of the petition an award had been made by the Shipping Board and 75 per cent thereof paid to the claimant, it is unquestionable that the Court of Claims had jurisdiction over some part of the causes of action alleged in the petition.

On April 11, 1923, the claimant presented to the clerk of the Court of Claims a *praecipe* for dismissal which the clerk refused to enter. (Petition, page 4.)

Thereupon the claimant made a motion to dismiss and on the following day the United States filed in the Court of Claims a motion for an order to withdraw its general traverse and file its answer and cross-bill.

(Petition, paragraph IV, page 5.) Claimant's motion to dismiss and the motion of the United States to file the counterclaim were set down for hearing for April 23, 1923. On that day these motions were argued and submitted, and on April 30, 1923, the Court of Claims entered an order dismissing the cause. (Petition, paragraph V, page 6.)

On June 9, 1923, before the expiration of the term of the Court of Claims at which the order of dismissal had been granted, the United States filed a petition for rehearing of the claimant's motion to dismiss the petition and for leave to file an answer alleging a set-off and counterclaim and to prosecute the same. (Petition, paragraph IX, pages 14–15.)

On October 22, 1923, the Court of Claims inadvertently entered an order denying the petition and motion of the United States to vacate the order of dismissal and overruling and denying the motion to file the counterclaim. (Petition, paragraph IX, page 16–17.) Thereafter, on the following day, October 23, the Court of Claims of its own motion vacated the order of October 22 and set the motion down for further hearing. The motion was argued and submitted on November 12, 1923, and on November 28, 1923, the Court of Claims filed its opinion and entered an order overruling the motion to dismiss and allowing the Government to file its counterclaim. (Petition, paragraph IX, page 17.) The counterclaim was thereupon filed on December 1, 1923. (Petition, paragraph IX, page 16.)

The petition of the United States in the Court of Claims is set out in the record from that court submitted as part of the papers on this application. From this petition in the Court of Claims it appears that the motion to vacate the order dismissing the petition was based upon the suppression by the claimant in the Court of Claims on its motion to dismiss of material facts which, if brought to the attention of the court, would necessarily have led to a contrary ruling, and further it was brought out that the Court of Claims in granting the application to dismiss the petition in April, 1923, did not render any decision on the motion of the United States for leave to file a counterclaim.

Upon these facts, which are in no way contradicted in the petition before this court, but, on the contrary, are taken from the petition and the record in the Court of Claims therewith submitted, it clearly appears that the Court of Claims had jurisdiction of the claim as filed with respect at least to certain causes of action therein set forth. As the court had jurisdiction of the claim, it necessarily, under Section 145 of the Judicial Code, had jurisdiction of the counterclaim. The court, in the month of April of its term, entered an order of dismissal, but while this order was final and while in force terminated the suit, nevertheless the Court of Claims had the same power during the term to modify or set aside this order as has any other court. Every decree of every court, whether final in form or not remains under the jurisdiction of the

court during the term at which it is entered and every court has power and jurisdiction during its term to entertain an application to vacate or set aside any decree which it may have entered during the term.

Every court also has the power, if a default in pleading has occurred, to open the default and permit the pleading to be filed.

The reasons for the delay in filing the counterclaim were fully explained, to the satisfaction of the Court of Claims. They are set out in the petition of the United States to vacate the order of dismissal and may be briefly summarized as follows:

While the cause was pending in the Court of Claims, the claimant, petitioner herein, made an application to the Shipping Board for an award of just compensation pursuant to the Act of June 15, 1917, as amended by the Merchant Marine Act 1920, Section 4. This proceeding was pending for about two years. During this period no action was taken in the Court of Claims. In February, 1923, the Shipping Board made an award in which it held that while the claimant was entitled to approximately Three Million Dollars of credits, there were off-sets and debits against these allowances amounting to several million dollars more, and the claim was therefore rejected. The General Counsel of the Shipping Board thereupon advised the Attorney General accordingly and recommended that a counterclaim should be filed. The Attorney General, through his assistants and deputies, thereupon prepared the counterclaim and it was presented to the Court of

Claims the day after the motion for leave to dismiss the claim had been filed but before the court had heard the motion.

As is apparent from the opinion of the Court of Claims the same grounds were raised before that court as are now attempted to be raised by this petition, namely, that the Court of Claims (*a*) never had jurisdiction of the claim, (*b*) had lost jurisdiction on the entry of the order dismissing the petition, (*c*) that the counterclaim was filed too late and in violation of the rules of the court. All of these contentions were decided adversely to the claimant.

The contention now made by the petitioner on this application, when analyzed, resolves itself down to the following manifestly untenable proposition.

That where the Court of Claims has jurisdiction of a claim and the United States files a counterclaim or prays leave to file a counterclaim, the claimant can defeat the jurisdiction of the Court of Claims over the counterclaim by bringing a suit in another court with respect to the same cause of action against the agent of the United States, out of whose dealings with claimant the cause of action against the United States arose. In other words, the claimant can take advantage of his own act and by bringing a suit in a District Court can nullify the provisions of the laws of the United States under which every claimant who comes into the Court of Claims submits himself to the jurisdiction of that court over any counterclaim which may be asserted by the United States.

Upon the questions of law involved on this application, the following points and authorities are submitted:

FIRST POINT.

The filing of the counterclaim by the United States in the Court of Claims, if not a matter of right, was a subject for the exercise of the judicial discretion of that court.

There is no rule in the Court of Claims limiting the time within which a counterclaim may be filed. It is so held by the Court of Claims. In this case the court said in its opinion (p. 20, infra):

> The rule of court does not limit the filing of a counterclaim, set-off, or demand by the Government to sixty days. Rule 29 provides for demurrer or plea within sixty days after the petition is filed "unless the court extend the time." Rule 34 provides that in the absence of demurrer, plea, or answer, or notice of a counterclaim or demand, the general traverse shall be considered as entered, but the allowance of the filing of a counterclaim or other of the defensive matters contemplated by section 145, Judicial Code, has been uniformly held to be within the court's discretion after the lapse of the sixty-day period. If it be said that the court has power to make rules of practice, it is yet true that it has not by its rules so limited the time of pleading the special defenses set forth in section 145 that such defenses may not thereafter be presented. In this connection section 175, Judicial Code, is of some moment.

This court does not prescribe the rules of practice in the Court of Claims. It is therefore submitted that in so far as the rules of the Court of Claims are not inconsistent with law, the Court of Claims must be presumed to know its own rules and to interpret them correctly. The applicable rule of law was settled many years ago in *Huske's case*, 46 C. Cls. 35. The point is also directly covered in *McElrath* v. *United States*, 102 U. S. 426, 440. It is not even essential that a counterclaim should be filed in order for the United States to prove offsets against the claimant. *Wisconsin Central Railroad*, 164 U. S. 190, 212; *Huse case*, 222 U. S. 496, 505.

Second Point.

The provisions of section 154 of the Judicial Code are matters of defense but can not be invoked by the claimant to deprive the Court of Claims of jurisdiction of a counterclaim.

Section 154 provides as follows:

> No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States. (36 Stat. L. 1138.)

In the case at bar the claimant in the Court of Claims, with knowledge of the fact that a counter-

claim was asserted by the United States, brought suit against the Fleet Corporation in a State Court in the State of Washington. This suit was begun immediately after the entry of the order of April 30, 1923, granting the claimant's motion to dismiss. (Petition, paragraph VIII, page 13.) The term of the Court of Claims, however, had not expired. Whatever the intention of the petitioner may have been with regard to defeating the counterclaim by bringing this suit, the petitioner now takes the position that the counterclaim can not be presented in the Court of Claims because the petitioner has brought suit against the Fleet Corporation and that suit is pending.

If this position were sound, it would necessarily follow that in any case brought in the Court of Claims by any claimant as soon as the United States filed a counterclaim and asked affirmative judgment, the jurisdiction of the Court of Claims to entertain the counterclaim could be defeated by the claimant bringing suit in another court against the agent of the United States through whom the contract sued on had been made, a manifestly absurd conclusion. The wording of Section 154 is not that the Court of Claims shall have no jurisdiction when any other suit is pending but that no person "shall file or prosecute" in that court any claim with respect to which he or his assignee has pending in any court any suit against any person acting or professing to act under authority of the United States. The statute is in the alternative but specifically relates to the rights of the

claimant only and not in any way to the rights of the United States with respect to its counterclaim.

Jurisdiction over the counterclaim is expressly conferred by the second paragraph of Section 145 of the Judicial Code which provides:

> That the Court of Claims shall have jurisdiction to *hear* and *determine* the following matters: * * * Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States *against any claimant against the Government in said court* * * *.

Section 146 provides as follows:

> Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the Government against *any person making claim against the Government in said court*, the court shall *hear and determine* such claim or demand *both for* and against *the Government* and claimant; and if upon the whole case it finds that the claimant is indebted to the Government *it shall render judgment to that effect* * * *.

Section 156 of the Judicial Code provides:

> Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, * * * within six years after the claim first accrues.

There is no limitation with respect to the time when the counterclaim of the United States may be filed, and the general rule doubtless applies that the United States is not bound by any Statute of Limi-

tations unless such statute is made clearly applicable to the Government under express terms by an Act of Congress.

THIRD POINT.

The remedy of the petitioner is not by mandamus or by prohibition but by appeal from such final judgment as the Court of Claims may enter on the counter claim.

It is only in exceptional cases where a trial court is clearly acting without jurisdiction that a writ of mandamus or prohibition will be granted. Where jurisdiction exists and the question is whether the exercise of jurisdiction has been rightful or wrongful, the party aggrieved will be left to his remedy by appeal. It is true that in a few exceptional cases mandamus has been granted, but it is submitted that the Court of Claims clearly acted within its jurisdiction and that its action was fully authorized by law and that if it committed any error, such error is clearly reviewable by appeal.

While, in the case at bar, the motion to vacate the order dismissing the claim was made at the same term, it may well be that this motion could have been made at any time within two years.

Section 175 of the Judicial Code provides that:

> The Court of Claims * * * within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial * * * upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States.

The effect of this section is to abrogate, with respect to the Court of Claims, the general rule that a motion for a new trial must be made during the term of court at which final judgment is entered, and for that purpose to extend the term for a period of two years from the date of entry of final judgment for the claimant.

An appeal from the final judgment which will be ultimately rendered is expressly authorized by Judicial Code, Section 242.

It follows that the Court of Claims had jurisdiction to open its order of dismissal. Whether jurisdiction was rightfully exercised is a question not reviewable by mandamus or prohibition.

> *Exparte Peterson*, 253 U. S. 300, 318, 319.
> *In the Matter of Nineteen Barges*, and authorities there cited December 10, 1923 (not yet officially reported).

FOURTH POINT.

The motion for leave to file the petition should be denied.

JAMES M. BECK,
Solicitor General.
ROBERT H. LOVETT,
Assistant Attorney General.

CHAUNCEY G. PARKER,
General Counsel,
United States Shipping Board,

HENRY M. WARD,
Special Counsel,
United States Shipping Board,
Of Counsel.

EXHIBIT "A."

Court of Claims of the United States.—No. 199–A.—(Decided November 28, 1923.)

SKINNER AND EDDY CORPORATION *v.* THE UNITED STATES.

On Plaintiff's Motion to Dismiss.

CAMPBELL, *Chief Justice,* rendered the opinion of the court:

The plaintiff filed a motion to dismiss its case without prejudice to the bringing of another action. Its motion is as follows:

"Comes now the claimant in the above-entitled cause and moves to dismiss this cause without prejudice to the filing of a new action. The ground of said motion is that prior to the filing of the petition herein the petitioner had not presented to the President of the United States nor to his authorized agent the claim which is set out in the petition herein or any part thereof. The act of June 15, 1917, as interpreted by this court and the Supreme Court of the United States, provides that the President of the United States has authority to cancel such contracts as are set forth in the petition herein between petitioner and the United States, and said act further provides that whenever the United States shall cancel such contract it shall make just compensation therefor to be determined by the President, and if the amount so determined by the President is not satisfactory to the person entitled to receive the same, that then such person shall be paid 75 per cent of the amount so determined by the President and shall be entitled to sue the United States to recover such sum as added to said 75 per cent will make up such amount as will be just compensation.

This act, therefore, requires that claims such as are embodied in the present petition be presented to the President of the United States or to his duly accredited agent and that the President or such agent should determine the amount of just compensation prior to the filing of a suit in this court on such claim. As said claim was not presented either to the President or to his duly accredited agent, and therefore not acted upon, it follows that this court has no jurisdiction over this claim.

"Petitioner, therefore, asks that this cause be dismissed without prejudice to the filing of a new suit covering the same subject matter."

The petition was filed on the 15th of June, 1921, and nothing had been done in the case so far as the court docket discloses further than the entry by the clerk of the general traverse under the rules of the court. The plaintiff's motion to dismiss was filed on April 11, 1923, and the defendant's motion to set aside the general traverse and be allowed to plead was filed on the next day, April 12. These were sent to the Law Calendar and were heard together by the court on April 23, 1923. When the parties, by counsel, were heard in argument the plaintiff insisted it should be allowed to dismiss the case, and the defendent urged that the case be not dismissed and that the Government's counterclaim should be filed. The court entered an order allowing plaintiff's motion. A motion by the Government for a rehearing upon this motion was inadvertently overruled, but this action was vacated and the motion again set for hearing. This brought the entire question again before the court, and the question is upon the right of plaintiff to dismiss its action over the Government's objection and its motion to file a counterclaim or demand against the plaintiff.

We think it quite clear that a plaintiff filing his petition against the Government in the Court of Claims has no absolute right to dismiss the case over the objection of the defendant. This results from the terms of the statute under which alone the Government submits itself to suit. In *Schillinger's case*, 155 U. S. 163, 166, it is said:

"The United States can not be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government."

One of the "contingencies" here referred to is that the plaintiff may be confronted with some one or more of the matters mentioned in the jurisdictional act (section 145, Judicial Code). This section confers jurisdiction to hear and determine, first, enumerated claims against the Government, and "Second: All set-offs, counterclaims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court." This language is comprehensive and embraces any demand that the Government has against a claimant in the court. Referring to this second paragraph of section 145 the Supreme Court, speaking through Mr. Justice Harlan in *McElrath's case*, 102 U. S. 426, 440, say:

"Suits against the Government in the Court of Claims, whether reference be had to the claimant's

demand, or to the defence, or to any set-off or counterclaim which the Government may assert, are not controlled by the seventh amendment. They are not suits at common law within its true meaning. The Government can not be sued except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the Government in the special court organized for that purpose, he may be met with a set-off, counterclaim, or other demand of the Government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the Government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the Government to the exercise of the privilege. Nothing more need be said on this subject." See also section 146 of the Judicial Code.

In view of the statute and the decisions of the Supreme Court, as well as those of this court, the most that a plaintiff can invoke upon his motion for an order of dismissal, objected to by the Government, is the exercise of a sound discretion by the court in the circumstances of the particular case. The question was carefully considered in *Huske's case,* 46 C. Cls. 35, where the plaintiff sought to discontinue his suit, but before an order of discontinuance was made the Government filed its counterclaim. The court, in line with the decisions above cited, declared that

when a claimant seeks the jurisdiction of this court for a judicial determination of his rights against the United States he subjects himself to the decision and determination of whatever claims the United States may have against him which may be properly pleaded by way of set-off, counterclaim, or claim for damages. It was further said (p. 39):

"But when a party invokes the jurisdiction to obtain a money judgment against the United States he should know that if the Government has a counterclaim it is liable to be pleaded. For that matter, we may say incidentally, it ought to be pleaded as promptly as possible. With definite notice that a counterclaim actually exists, plaintiff ought to be held to meet the Government demand without being permitted to hurriedly get out of court and thereby evade the consequences of that which he knows he should meet somewhere. It would be an abuse of the sound discretion of the court to permit discontinuance under such circumstances if the statute is to have its proper meaning and effect."

There is nothing in the *Atlantic Construction Company case*, 35 C. Cls. 30, that militates against the conclusion in the *Huske case*. The latter points out the reason under the facts for the court's action in the earlier case, and this earlier decision held that the question was within the sound discretion of the court. In the *Huske case* the motion to discontinue was overruled, and we think that the rule was there correctly announced and should be adhered to.

The plaintiff's motion is set forth above. When it came to be heard the defendant opposed its allowance and apprised the court of the fact that there was a counterclaim, which the Government asked leave to

file. The court only considered the question stated and submitted in the motion. An examination of it shows that the plaintiff's petition asks relief on account of a number of transactions, a large part of which are not involved in the contracts alleged to have been canceled or attempted so to be. The petition avers that the five contracts were made by the Fleet Corporation "representing the United States" and in pursuance of the authority delegated to it by the President under specified acts of Congress. It is repeatedly averred that the Fleet Corporation represented the United States. It is averred that on the 25th day of April, 1919, the contracts were canceled by the Fleet Corporation "representing the United States." It is averred in paragraph 14 that plaintiff expended large sums in anticipation and belief that "the defendant" would in all respects comply with the terms of said contracts and that it was dispossessed of its plant and improvements thereto "by the defendant." It is averred that the Fleet Corporation "representing the United States" took over and removed large amounts of materials and that the alleged value thereof, many thousands of dollars, "is now due petitioner by the defendant."

It is alleged in paragraph 18 that the plaintiff built the fifteen vessels agreed to be built under one of the contracts and delivered them to the United States, "and the United States, through its proper officers and agents, accepted" them, but that the final payment due upon one of them, amounting to $184,500, was unjustly withheld from and is now due to petitioner from the United States. In paragraph 19 are claims of more than $600,000 alleged to be due and owing by the defendant. It further appears that claim is made for work and labor done, for repairs

made and for other items in large amounts which are claimed against the United States as the defendant in the suit.

The plaintiff invokes, among other things, the remedy provided by statute authorizing the suspension or cancellation of certain contracts. Act of June 15, 1917, 40 Stat. 183. This act provides for a liability of the Government. The averment of the petition is that the Fleet Corporation, representing the United States, ordered the cancellation of the contracts over the protest of plaintiff. Referring to this and other statutes amending it, 40 Stat. 535, 1022, it is averred in paragraph 6 of the petition as follows: "In pursuance of the authority delegated as aforesaid to the United States Shipping Board Emergency Fleet Corporation by the President of the United States under the acts of Congress aforesaid, the said United States Shipping Board Emergency Fleet Corporation, representing the United States, and in behalf thereof entered into five certain contracts with petitioner, said contracts being known as Supplemental Contract No. SC–10, and Contracts Nos. SC–175, SC–309, SC–324, and SC–447, all of which will be hereinafter more particularly referred to."

Judgment is asked against the United States as defendant for a sum in excess of seventeen millions of dollars. Manifestly the petition on the face of it avers claims against the United States. What may be the legal effect of the failure to present claim to the President or the duly authorized board, as stated in plaintiff's motion to dismiss, if such be the fact, it is not necessary to decide at this time. See *Houston Coal Company case*, 262 U. S. 361.

It is our view that the case of *Sloan Shipyards et al.* v. *U. S. Fleet Corporation*, 258 U. S. 549, does not

hold that the United States is not suable in this court on account of lawful transactions of the Fleet Corporation as the Government's agent. The case does decide that the agent itself could be sued—in other words, that "the agent, because he is agent, does not cease to be answerable for his acts." But this is not to say that a principal not himself exempt from judicial process may not be sued. The general rule is that where a party who discloses his principal and is known to be acting as an agent enters as such into such a contract he is not liable thereon in the absence of his express agreement to be bound thereby. *Whitney* v. *Wyman*, 101 U. S. 392; *Ford* v. *Williams*, 21 How. 287, 289. The real question in the case mentioned was upon the right to sue the Fleet Corporation under the averments in the pleadings in that case. It is said (p. 567): "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act." See also *Clallam County* v. *United States et al.*, decided by the Supreme Court November 26, 1923, citing, among other cases, *King County* v. *Fleet Corporation*, 282 Fed. 950.

Whatever right plaintiff may have had to sue the Fleet Corporation under the contracts the fact remains that suit was brought against the United States in this court, and we do not think that the *Sloan Shipyards case* decides that such a suit can not be maintained.

The rule of court does not limit the filing of a counterclaim, set-off, or demand by the Government to sixty days. Rule 29 provides for demurrer or plea within sixty days after the petition is filed

"unless the court extend the time." Rule 34 provides that in the absence of demurrer, plea, or answer, or notice of a counterclaim or demand, the general traverse shall be considered as entered, but the allowance of the filing of a counterclaim or other of the defensive matters contemplated by section 145, Judicial Code, has been uniformly held to be within the court's discretion after the lapse of the sixty-day period. If it be said that the court has power to make rules of practice, it is yet true that it has not by its rules so limited the time of pleading the special defenses set forth in section 145 that such defenses may not thereafter be presented. In this connection section 175, Judicial Code, is of some moment.

The court has frequently rendered judgment dismissing a petition or reducing a recovery, in the absence of such a plea, where the facts developed an indebtedness or liability of the plaintiff to the Government. See *Wisconsin Central Railroad case*, 164 U. S. 190, 212; *Huse case*, 222 U. S. 496, 505; *extra pay cases* (*Spanish War*). It may be conceded that without a proper plea or answer setting up, or at least giving notice of, a counterclaim or other demand under the statute, there would be no sufficient basis for a judgment against a plaintiff for the excess of the counterclaim over the amount found to be due him. *Shrewsbury case*, 13 C. Cls. 183; *Boughton case*, 13 C. Cls. 284. But this consideration should not prevent the filing of a proper plea seeking affirmative relief when it is offered before evidence on either side is taken.

After considering the petition, the affidavits, and arguments adduced we are satisfied that the plain-

tiff's motion to dismiss should not have been allowed. That order will be vacated and another order entered overruling the motion to dismiss, and allowing the Government to file its counterclaim.

GRAHAM, *Judge;* HAY, *Judge;* DOWNEY, *Judge;* and BOOTH, *Judge,* concur.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

ORIGINAL, NO. 28.

IN THE MATTER OF SKINNER AND EDDY CORPORATION.

RESPONSE OF THE COURT OF CLAIMS AND THE JUDGES THEREOF TO THE RULE TO SHOW CAUSE WHY THE PRAYER OF THE PETITIONER FOR A MANDATE AGAINST SAID COURT SHOULD NOT BE GRANTED.

On January 28, 1924, a motion for leave to file a petition for a writ of mandamus, or, in the alternative, a writ of prohibition, against the Court of Claims, was granted by the Supreme Court, and at the same time a rule to show cause why the prayer of said petition should not be granted was issued, returnable April 7, 1924. A copy of the said petition and rule of the Supreme Court was served on the Court of Claims on February 9, 1924.

The prayer of the petition is for a writ of mandamus requiring the Court of Claims to restore its order of April 30, 1923, dismissing the case of the *Skinner and Eddy Corporation* v. *The United States*, No. 199–A, and to set aside its order of November

93436—24—1

28, 1923, vacating said order of dismissal of April 30, 1923, and prohibiting said Court from attempting to exercise any further jurisdiction over said case.

Therefore, in response to said rule to show cause why a writ of mandamus should not issue to compel the Court of Claims to obey the mandate of the Supreme Court, said court and the judges thereof say that they deny each and every allegation of the petition wherein the averments may be material to the questions involved, except as hereinafter admitted in this response.

(1) On June 15, 1921, the petitioner brought suit in the Court of Claims against the United States for an alleged balance, "exclusive of all just credits and offsets," of $17,493,488.97. According to the allegations of the petition (see petitioner's Exhibit D, Vol. 1), this suit grew out of balances due on the construction of ships delivered to the United States, bonuses for advanced deliveries of ships to the United States, extra labor, extra work, and repairs on vessels constructed and delivered to the United States. Upon the facts alleged, this cause of action was within the general jurisdiction of the Court of Claims and section 145, Judicial Code. The principal part of the claim grew out of the cancellation of two contracts between the petitioner and the United States Emergency Fleet Corporation "representing the United States." The largest single item of the claim is for anticipated profits on the 25 vessels on which work was canceled,

amounting to $17,303,845.25. Copies of the contracts are attached to the petition filed in the Court of Claims. (See Exhibit D, Vol. 1, pp. 45–597.) It appears that these contracts were canceled or suspended or attempted so to be under the Emergency Shipping Fund provisions of the Act of June 15, 1917, Ch. 29, 40 Stat. 182, 183, as amended by Section 2, Paragraph (c) of the Merchant Marine Act of June 5, 1920, Ch. 250, 41 Stat. 989, conferring certain powers on the United States Shipping Board, as follows:

> Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. (40 Stat. 183.)
>
> (c) As soon as practicable after the passage of this Act the board shall adjust, settle, and

> liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such Act or parts of Acts; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided*, That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed. (41 Stat. 989.)

(2) On August 15, 1921, no plea, answer, or notice of any counterclaim having been filed by the Government, a general traverse was entered by the Clerk of the Court of Claims under Rule 34 of said Court. Thereafter, no evidence was taken in said case, nor brief filed, nor any other proceedings looking to its disposition had until the petitioner's motion to dismiss the case was filed on April 11, 1923. During that period the docket of the Court of Claims was called regularly twice a year and the attention of petitioner called to the condition of the case.

(3) On April 11, 1923, the petitioner filed in the clerk's office a motion to dismiss its said suit "without prejudice to the filing of a new suit" upon the ground that the claim prior to the filing of the petition in the Court of Claims had not been presented "to the President or to his duly accredited agent" and acted on, and the court had therefore no jurisdic-

tion of this claim under the Act of June 15, 1917. The said motion is as follows:

> Comes now the claimant in the above-entitled cause and moves to dismiss this cause without prejudice to the filing of a new action. The ground of said motion is that prior to the filing of the petition herein the petitioner had not presented to the President of the United States nor to his authorized agent the claim which is set out in the petition herein or any part thereof. The act of June 15, 1917, as interpreted by this court and the Supreme Court of the United States, provides that the President of the United States has authority to cancel such contracts as are set forth in the petition herein between petitioner and the United States, and said act further provides that whenever the United States shall cancel such contract it shall make just compensation therefor to be determined by the President, and if the amount so determined by the President is not satisfactory to the person entitled to receive the same, that then such person shall be paid 75 per cent of the amount so determined by the President and shall be entitled to sue the United States to recover such sum as added to said 75 per cent will make up such amount as will be just compensation. This act, therefore, requires that claims such as are embodied in the present petition be presented to the President of the United States or to his duly accredited agent and that the President or such agent shall determine the amount of just compensation prior to the filing of a suit in this court on such claim. As said claim

> was not presented either to the President or to his duly accredited agent, and therefore not acted upon, it follows that this court has no jurisdiction over this claim.
>
> Petitioner, therefore, asks that this cause be dismissed without prejudice to the filing of a new suit covering the same subject matter.

(4) On April 12, 1923, the following motion was filed in the clerk's office on behalf of the Government:

> Now comes the defendant by its Attorney General and moves the court for an order granting to it the right to withdraw its general traverse heretofore filed in this cause and to file its answer and cross bill.

These two motions were in regular course brought to the court's attention and were on April 16, 1923, sent by the court to its Law Calendar for hearing on Monday, April 23, 1923.

(5) On April 23, 1923, the motions were argued, and at that time the court was informed by the attorney representing the Government that the purpose of its motion was to obtain leave to file and insist upon a counterclaim or demand which the Government claimed to have against the petitioner. The attorney for the petitioner argued, and he admits he "actually said" in his argument of the motion to dismiss, "that this court had no jurisdiction of a petition for just compensation until such compensation had been determined (by the Shipping Board) and that the present petition therefore must be dismissed because it was prematurely filed." (Exhibit D, Vol. II, pp. 41, 42.) During this hearing

and argument it was not stated or shown to the court that the claim in question had been presented to the Shipping Board on December 31, 1920, more than six months before said suit was filed, nor was it made to appear that the Shipping Board, on February 14, 1923, had made an award on said claim by which it was determined that the petitioner was entitled to receive the sum of $3,130,433.46 from the United States and that the United States was entitled on its counterclaim to receive a sum in excess of $4,700,000 from the petitioner. (Exhibit D to the petition herein, Vol. II, pp. 11, 12, 13, 17, 18, 20, 21, 23, 24.) Nor did the attorney for petitioner mention that he had made a written request for a certified copy of the resolutions of said Board (Exhibit D, p. 21), and that the Shipping Board, on March 15, 1923, had mailed a certified copy of the resolution and award to the petitioner (Exhibit D, Vol. II, pp. 18, 19). This was nearly a month before the motion to dismiss was filed.

At the time the motion to dismiss was argued it was not brought to the attention of the court by counsel for either party or otherwise that the causes of action alleged in the petition included causes of action to recover damages for alleged breaches of shipbuilding contracts specifically alleged to have been made between the claimant and the United States, nor that, as was the fact, such causes of action were within the general jurisdiction of this Court under Section 145 of the Judicial Code and not within the special jurisdiction respecting just com-

pensation conferred by said Act of June 15, 1917, 40 Stat. 183, as amended by the Merchant Marine Act, 1920, 41 Stat. 989.

At the time the motion to dismiss was argued, it was not made to appear that the attorney representing the Government had been informed either that the claim for an award of just compensation had been prosecuted before the Shipping Board, or that the Shipping Board had made any award thereon; nor did said attorney, or anyone else, inform the court of such action by the Shipping Board. (Exhibit D, Vol. II, pp. 23, 24.)

On April 30, 1923, the Court of Claims entered an order allowing plaintiff's motion and dismissing the petition. At the time this order was entered the court had no information of the award of the Shipping Board.

(6) The petition herein shows that on May 1, 1923, the day after the suit was dismissed in the Court of Claims, the petitioner filed a suit against the United States Shipping Board Emergency Fleet Corporation in the State Court of the State of Washington, at Seattle, for $9,129,401.14. On the same day that suit was filed service, as required by State law, was made on the Emergency Fleet Corporation.

(7) On June 9, 1923, at the same term of the Court and within the time allowed by the rule of court, the Government filed its motion in the clerk's office for a reargument of petitioner's said motion of April 11, 1923, to dismiss without prejudice and to vacate the order of dismissal of April 30, 1923, "and for an order au-

thorizing the filing by the United States of a set-off and counterclaim pursuant to the motion filed herein April 12, 1923, and not passed upon by the court." This motion, with its accompanying affidavits, was the first pleading which mentioned the filing of the claim with the Shipping Board and the final action of said Board thereon. The attorney for the Shipping Board who had at that time been placed in charge of the defense of the case had requested that notice be given him when the motion would be taken up for consideration. This notice, through some oversight, was not given, and on October 22, 1923, the motion was inadvertently overruled, but this order of October 22, 1923, was set aside and the motion set down for hearing. On that day both parties again appeared and plaintiff filed one or more affidavits, as appears from said Exhibit D, and after argument, in which the different matters contained in said motion of the Government, filed as aforesaid on June 9, 1923, were brought to its attention, the court, on November 28, 1923, entered the following order:

> This case having been heard upon the defendant's motion to vacate the order of the court dismissing the petition which was heretofore made upon the motion of the plaintiff and upon the motion of the defendant for leave to file its counterclaim or other demand against the plaintiff and upon the affidavits filed in connection with said motions, it is now ordered by the court that the order

heretofore made dismissing the petition be and the same is vacated and set aside and the said case is restored to the docket. It is further ordered that the defendant's motion for leave to file its counterclaim be and the same is allowed.

(8) It is true that the Court of Claims on April 4, 1921, held in the *College Point Boat Corporation* v. *The United States*, No. 34220, that where a contract between said Corporation and the Navy Department, dated October 25, 1918, was canceled by said Department on February 26, 1918, the contractor was entitled to recover anticipated profits, the cancellation being treated like any other breach of contract, and the petition states that "this decision was relied upon by petitioner in filing said suit in the Court of Claims on June 15, 1921, because it held (a) that a cancellation of such a contract was a breach, and (b) that the United States was liable in damages for such breach." It is also true that "the decision of the Court of Claims in the *College Point case* was not allowed by that court to stand, but was later entirely withdrawn and does not appear in the published reports of the Court of Claims." (Petition, p. 9.) The petitioner fails to state, however, that a motion for a new trial had been filed and was pending in the *College Point Boat Corporation case* on May 29, 1921, over two weeks before petitioner filed its said suit in the Court of Claims.

On May 21, 1923, upon the trial *de novo*, new findings of fact, judgment, and opinion were filed

in the *College Point Boat Corporation case*, in which it was held that the plaintiff was not entitled to anticipated profits.

(9) On January 9, 1922, the court in the case of *Meyer Scale Company* v. *The United States*, 57 C. Cls. 26, overruled its decision in the *College Point Boat Corporation case* as to anticipated profits, and on January 16, 1922, a new trial was allowed in the *Boat Corporation case*, the judgment set aside, and the findings withdrawn.

It is now claimed by petitioner that it was only after the decision by this court in the *Russell Motor Car Company case*, 261 U. S. 514, that it knew "authoritatively" that it could not secure such profits in the Court of Claims (Petition, p. 8), and petitioner emphasizes its allegation that "in bringing its said suit in the Court of Claims said petitioner was induced so to do by the holding of the Court of Claims in said *College Point case*" (Petition, p. 10). These grounds now urged for granting the writ of mandamus were not mentioned in petitioner's motion "to dismiss without prejudice," filed on April 11, 1923 (Exhibit D, Vol. II, pp. 4, 5), but the reason given was, as heretofore stated, that there had been no presentation of the claim to the President or his agent, or final action thereon by either, and that the Court was therefore without jurisdiction of the claim. If the plaintiff was misled by the court's first decision in the *College Point case*, holding there could be a recovery of anticipated profits, it is difficult to account for its dropping that item of

claim in its suit in the State Court at Seattle, where it alleges it has brought suit "for all of said items except the claim for anticipated profits." This suit was brought in the State Court of the State of Washington against the United States Shipping Board Emergency Fleet Corporation on May 1, 1923, the day after the said order of dismissal by the Court of Claims on April 30, 1923, and notice was served on the Fleet Corporation on the same day. (Petition, p. 13.) It seems at least probable that suit was brought in that Court in an effort to escape the counterclaim awarded by the Shipping Board on February 14, 1923.

(10) When the Court of Claims granted the petitioner's motion of April 11, 1923, and entered its order thereon April 30, 1923, it did not know, and was not informed, that an award had been made upon the claim by the Shipping Board, or that a claim had been filed with that Board by or for plaintiff. As appears from the motion itself, the ground upon which it was based was its statement that no such award had been made, and that the Court of Claims was therefore without jurisdiction of the suit under the Act of June 15, 1917, 40 Stat. 183, as amended by the Act of June 5, 1920, 41 Stat. 989. The petitioner had notice that an award had been made by the Shipping Board at the time its motion of April 11, 1923, to dismiss the petition was filed. It appears from the affidavit of the proper officer of the Shipping Board that petitioner or its attorney of record knew that the Shipping Board had made the award

aforesaid. (Exhibit D, Vol. II, pp. 18–21.) As appears from the foregoing recital, the Court of Claims at no time from and after April 11, 1923, lost jurisdiction of said cause, the motions for hearing having been made within the time limited by its rules. In addition to this fact, attention is called to Section 175 of the Judicial Code, which reads as follows:

> SEC. 175. The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.

This Section 175 makes provision for a new trial while the claim "is pending before it," and also while it is pending "on appeal from it," but it does not stop there; it makes a general provision for a motion for a new trial "within two years, next after the final disposition of such claim." Final disposition of the claim was not made when the plaintiff's motion to dismiss was allowed on April 30, 1923. The court under its rules could reconsider this action. But if the disposition of the case had been final, the section in question would have kept the jurisdiction of the Court of Claims alive in the circumstances.

This court has held in a number of cases that it is not too late for the Court of Claims to grant a new trial under this act after an appeal has been taken to this court and it has assumed jurisdiction of the case. The only limitation upon the jurisdiction of the Court of Claims is that the motion for a new trial must be filed within two years after the judgment is rendered. See *Belknap* v. *United States*, 150 U. S. 588; *In re District of Columbia*, 180 U. S. 250, 253; *Fuller* v. *United States*, 182 U. S. 562, 569–572; *Sanderson* v. *United States*, 210 U. S. 168, 175.

The fact that the suit was brought so soon in a State court of the State of Washington against the Shipping Board Emergency Fleet Corporation, where there was no provision of law for the interposition of a counterclaim by the United States, in no way lessens the effect of plaintiff's action, or prevents the tentacles of Section 175 from attaching to the claim. The petition urges it would be "unjust" to require it to remain in the Court of Claims where the United States may "wage" a counterclaim against it; but this alleged injustice is not really so great when it is remembered that the same provision allowing this counterclaim to be "waged" was in full force when the petitioner originally filed its suit in the Court of Claims.

As stated in the opinion of the Court of Claims on said motion, the claim of the petitioner filed in the Court of Claims on June 15, 1921, embraces items for balances due on ships completed and delivered to the United States, claims for bonuses for advance

deliveries of ships to the United States, for extra labor and extra work and repairs on ships delivered to the United States, all of which items, as well as the counterclaim, were within the jurisdiction of the Court of Claims, under Sections 145 and 146 of the Judicial Code, and these items are in no way dependent upon presentation to or on action by the Shipping Board under the Act of June 15, 1917, *supra*, as amended by the Act of June 5, 1920, *supra*, in order to give jurisdiction to the Court of Claims.

In conclusion, the Court of Claims and the Judges thereof say that for the reasons set forth in the foregoing response of said court, the petition for a mandate should be dismissed, which is the prayer of your respondents.

The said opinion of the Court of Claims filed on November 28, 1923, is made part of this answer, and is attached hereto as Exhibit A.

THE COURT OF CLAIMS,
By EDWARD K. CAMPBELL,
Chief Justice.
FENTON W. BOOTH,
GEORGE E. DOWNEY,
JAMES HAY,
SAMUEL J. GRAHAM,
Judges.

JAMES M. BECK,
Solicitor General.
GEORGE M. ANDERSON,
Of Counsel.

EXHIBIT A.

COURT OF CLAIMS OF THE UNITED STATES.

No. 199–A.

(Decided November 28, 1923.)

SKINNER AND EDDY CORPORATION v. THE UNITED STATES.

On Plaintiff's Motion to Dismiss.

CAMPBELL, *Chief Justice*, rendered the opinion of the court:

The plaintiff filed a motion to dismiss its case without prejudice to the bringing of another action. Its motion is as follows:

"Comes now the claimant in the above-entitled cause and moves to dismiss this cause without prejudice to the filing of a new action. The ground of said motion is that prior to the filing of the petition herein the petitioner had not presented to the President of the United States nor to his authorized agent the claim which is set out in the petition herein or any part thereof. The act of June 15, 1917, as interpreted by this court and the Supreme Court of the United States, provides that the President of the United States has authority to cancel such contracts as are set forth in the petition herein between petitioner and the United States, and said act further provides that whenever the United States shall cancel such contract it shall make just compensation therefor to be determined by the President, and if the amount so determined by the President is not satisfactory to the person entitled to receive the same, that then such person shall be paid 75 per cent of the amount so determined by the President and shall be entitled to

sue the United States to recover such sum as added to said 75 per cent will make up such amount as will be just compensation. This act, therefore, requires that claims such as are embodied in the present petition be presented to the President of the United States or to his duly accredited agent and that the President or such agent should determine the amount of just compensation prior to the filing of a suit in this court on such claim. As said claim was not presented either to the President or to his duly accredited agent, and therefore not acted upon, it follows that this court has no jurisdiction over this claim.

"Petitioner, therefore, asks that this cause be dismissed without prejudice to the filing of a new suit covering the same subject matter."

The petition was filed on the 15th of June, 1921, and nothing had been done in the case so far as the court docket discloses further than the entry by the clerk of the general traverse under the rules of the court. The plaintiff's motion to dismiss was filed on April 11, 1923, and the defendant's motion to set aside the general traverse and be allowed to plead was filed on the next day, April 12. These were sent to the Law Calendar and were heard together by the court on April 23, 1923. When the parties, by counsel, were heard in argument the plaintiff insisted it should be allowed to dismiss the case, and the defendant urged that the case be not dismissed and that the Government's counterclaim should be filed. The court entered an order allowing plaintiff's motion. A motion by the Government for a rehearing upon this motion was inadvertently overruled, but this action was vacated and the motion again set for hearing. This brought the entire question again before the court, and the question is upon the right of plaintiff to dismiss its action over the Government's objec-

tion and its motion to file a counterclaim or demand against the plaintiff.

We think it quite clear that a plaintiff filing his petition against the Government in the Court of Claims has no absolute right to dismiss the case over the objection of the defendant. This results from the terms of the statute under which alone the Government submits itself to suit. In *Schillinger's case*, 155 U. S. 163, 166, it is said:

"The United States can not be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government."

One of the "contingencies" here referred to is that the plaintiff may be confronted with some one or more of the matters mentioned in the jurisdictional act (section 145, Judicial Code). This section confers jurisdiction to hear and determine, first, enumerated claims against the Government, and "Second: All set-offs, counterclaims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court." This language is comprehensive and embraces any demand that the Government has against a claimant in the court. Referring to this second paragraph of section 145 the Supreme Court, speaking through Mr. Justice Harlan in *McElrath's case*, 102 U. S. 426, 440, say:

"Suits against the Government in the Court of Claims, whether reference be had to the claimant's

demand, or to the defence, or to any set-off or counterclaim which the Government may assert, are not controlled by the seventh amendment. They are not suits at common law within its true meaning. The Government can not be sued except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the Government in the special court organized for that purpose, he may be met with a set-off, counterclaim, or other demand of the Government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the Government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the Government to the exercise of the privilege. Nothing more need be said on this subject." See also section 146 of the Judicial Code.

In view of the statute and the decisions of the Supreme Court, as well as those of this court, the most that a plaintiff can invoke upon his motion for an order of dismissal, objected to by the Government, is the exercise of a sound discretion by the court in the circumstances of the particular case. The question was carefully considered in *Huske's case*, 46 C. Cls. 35, where the plaintiff sought to discontinue his suit, but before an order of discontinuance was made the Government filed its counterclaim. The court, in line with the decisions above cited, declared that when a claimant seeks the jurisdiction of this court

for a judicial determination of his rights against the United States he subjects himself to the decision and determination of whatever claims the United States may have against him which may be properly pleaded by way of set-off, counterclaim, or claim for damages. It was further said (p. 39):

"But when a party invokes the jurisdiction to obtain a money judgment against the United States he should know that if the Government has a counterclaim it is liable to be pleaded. For that matter, we may say incidentally, it ought to be pleaded as promptly as possible. With definite notice that a counterclaim actually exists, plaintiff ought to be held to meet the Government demand without being permitted to hurriedly get out of court and thereby evade the consequences of that which he knows he should meet somewhere. It would be an abuse of the sound discretion of the court to permit discontinuance under such circumstances if the statute is to have its proper meaning and effect."

There is nothing in the *Atlantic Construction Company case*, 35 C. Cls. 30, that militates against the conclusion in the *Huske case*. The latter points out the reason under the facts for the court's action in the earlier case, and this earlier decision held that the question was within the sound discretion of the court. In the *Huske case* the motion to discontinue was overruled, and we think that the rule was there correctly announced and should be adhered to.

The plaintiff's motion is set forth above. When it came to be heard the defendant opposed its allowance and apprised the court of the fact that there was a counterclaim, which the Government asked leave to file. The court only considered the question stated and submitted in the motion. An examination of it shows that the plaintiff's petition asks

relief on account of a number of transactions, a large part of which are not involved in the contracts alleged to have been canceled or attempted so to be. The petition avers that the five contracts were made by the Fleet Corporation "representing the United States" and in pursuance of the authority delegated to it by the President under specified acts of Congress. It is repeatedly averred that the Fleet Corporation represented the United States. It is averred that on the 25th day of April, 1919, the contracts were canceled by the Fleet Corporation "representing the United States." It is averred in paragraph 14 that plaintiff expended large sums in anticipation and belief that "the defendant" would in all respects comply with the terms of said contracts and that it was dispossessed of its plant and improvements thereto "by the defendant." It is averred that the Fleet Corporation "representing the United States" took over and removed large amounts of materials and that the alleged value thereof, many thousands of dollars, "is now due petitioner by the defendant."

It is alleged in paragraph 18 that the plaintiff built the fifteen vessels agreed to be built under one of the contracts and delivered them to the United States, "and the United States, through its proper officers and agents, accepted" them, but that the final payment due upon one of them, amounting to $184,500, was unjustly withheld from and is now due to petitioner from the United States. In paragraph 19 are claims of more than $600,000 alleged to be due and owing by the defendant. It further appears that claim is made for work and labor done, for repairs made and for other items in large amounts which are claimed against the United States as the defendant in the suit.

The plaintiff invokes, among other things, the remedy provided by statute authorizing the suspension or cancellation of certain contracts. Act of June 15, 1917, 40 Stat. 183. This act provides for a liability of the Government. The averment of the petition is that the Fleet Corporation, representing the United States, ordered the cancellation of the contracts over the protest of plaintiff. Referring to this and other statutes amending it, 40 Stat. 535, 1022, it is averred in paragraph 6 of the petition as follows: "In pursuance of the authority delegated as aforesaid to the United States Shipping Board Emergency Fleet Corporation by the President of the United States under the acts of Congress aforesaid, the said United States Shipping Board Emergency Fleet Corporation, representing the United States, and in behalf thereof entered into five certain contracts with petitioner, said contracts being known as Supplemental Contract No. SC–10, and Contracts Nos. SC–175, SC–309, SC–324, and SC–447, all of which will be hereinafter more particularly referred to."

Judgment is asked against the United States as defendant for a sum in excess of seventeen millions of dollars. Manifestly the petition on the face of it avers claims against the United States. What may be the legal effect of the failure to present claim to the President or the duly authorized board, as stated in plaintiff's motion to dismiss, if such be the fact, it is not necessary to decide at this time. See *Houston Coal Company case*, 262 U. S. 361.

It is our view that the case of *Sloan Shipyards et al.* v. *U. S. Fleet Corporation*, 258 U. S. 549, does not hold that the United States is not suable in this court on account of lawful transactions of the Fleet Corporation as the Government's agent. The case

does decide that the agent itself could be sued—in other words, that "the agent, because he is agent, does not cease to be answerable for his acts." But this is not to say that a principal not himself exempt from judicial process may not be sued. The general rule is that where a party who discloses his principal and is known to be acting as an agent enters as such into such a contract he is not liable thereon in the absence of his express agreement to be bound thereby. *Whitney* v. *Wyman*, 101 U. S. 392; *Ford* v. *Williams*, 21 How. 287, 289. The real question in the case mentioned was upon the right to sue the Fleet Corporation under the averments in the pleadings in that case. It is said (p. 567): "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act." See also *Clallam County* v. *United States et al.*, decided by the Supreme Court November 26, 1923, citing, among other cases, *King County* v. *Fleet Corporation*, 282 Fed. 950.

Whatever right plaintiff may have had to sue the Fleet Corporation under the contracts the fact remains that suit was brought against the United States in this court, and we do not think that the *Sloan Shipyards case* decides that such a suit can not be maintained.

The rule of court does not limit the filing of a counterclaim, set-off, or demand by the Government to sixty days. Rule 29 provides for demurrer or plea within sixty days after the petition is filed "unless the court extend the time." Rule 34 provides that in the absence of demurrer, plea, or answer, or notice of a counterclaim or demand, the general traverse shall be considered as entered, but the allow-

ance of the filing of a counterclaim or other of the defensive matters contemplated by section 145, Judicial Code, has been uniformly held to be within the court's discretion after the lapse of the sixty-day period. If it be said that the court has power to make rules of practice, it is yet true that it has not by its rules so limited the time of pleading the special defenses set forth in section 145 that such defenses may not thereafter be presented. In this connection section 175, Judicial Code, is of some moment.

The court has frequently rendered judgment dismissing a petition or reducing a recovery, in the absence of such a plea, where the facts developed an indebtedness or liability of the plaintiff to the Government. See *Wisconsin Central Railroad case*, 164 U. S. 190, 212; *Huse case*, 222 U. S. 496, 505; *extra pay cases* (*Spanish War*). It may be conceded that without a proper plea or answer setting up, or at least giving notice of, a counterclaim or other demand under the statute, there would be no sufficient basis for a judgment against a plaintiff for the excess of the counterclaim over the amount found to be due him. *Shrewsbury case*, 13 C. Cls. 183; *Boughton case*, 13 C. Cls. 284. But this consideration should not prevent the filing of a proper plea seeking affirmative relief when it is offered before evidence on either side is taken.

After considering the petition, the affidavits, and arguments adduced we are satisfied that the plaintiff's motion to dismiss should not have been allowed. That order will be vacated and another order entered overruling the motion to dismiss, and allowing the Government to file its counterclaim.

GRAHAM, *Judge;* HAY, *Judge;* DOWNEY, *Judge; and* BOOTH, *Judge*, concur.